

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 11, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2015AP1069-CR

Cir. Ct. No. 2013CF664

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEMARIO DERRICK FOSTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County:
RICHARD T. WERNER, Judge. *Reversed and cause remanded with directions.*

Before Kloppenburg, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Demario Foster appeals a judgment of conviction for delivery of a controlled substance following a guilty plea. Foster contends that the circuit court erred by denying his motion to suppress evidence obtained in a search incident to arrest. He argues that the police lacked probable cause for the

arrest. For the reasons set forth below, we agree. We reverse and remand with directions.

¶2 Foster was arrested, searched, and charged with multiple drug offenses. Foster moved to suppress the evidence obtained in the search incident to his arrest, arguing that the police lacked probable cause to support the arrest.

¶3 The circuit court held an evidentiary hearing on Foster's suppression motion. At the hearing, two investigating officers testified to the following circumstances surrounding Foster's arrest. Two informants came to the police department and provided information that Foster possessed a handgun that he usually concealed in a black backpack that he carried. The informants also stated that Foster carried drugs at all times, on his person and in his backpack, and had offered drugs to the informants. The informants told the police that Foster had previously sold drugs and that "they could purchase from him if need be." The police were aware that Foster was a convicted felon.

¶4 The police arranged for one of the informants to conduct a controlled buy of crack cocaine from Foster, to take place during a car ride between two specified locations. The police maintained surveillance on the informant as she picked Foster up at the first location and drove him to the second location. The police used a hearing device to listen to the conversation between Foster and the informant during the drive, and were able to hear "just normal talk" during that time. The informant dropped Foster off at the second location and then met with the police at a separate location. The informant later reported that the drug transaction had occurred and provided the police with a substance that tested positive for cocaine.

¶5 Immediately upon Foster's arrival at the second location, the police arrested Foster and searched him incident to the arrest. The police noted that, upon arrival, Foster was carrying a black backpack. The police did not recall obtaining confirmation that the drug transaction had occurred prior to Foster's arrest.

¶6 The circuit court denied the suppression motion. The court cited the police testimony that the planned controlled buy had occurred during the car ride, that the informants had indicated Foster sometimes carried a handgun and always carried drugs in a black backpack, that the police knew Foster was a convicted felon, and that Foster was dropped off at the specified location carrying a black backpack. The court determined that there was probable cause for the arrest.

¶7 "In order to be lawful, an arrest must be based on probable cause. Probable cause for arrest exists when the totality of the circumstances within the arresting officer's knowledge would lead a reasonable police officer to believe that the defendant probably committed a crime." *State v. Kutz*, 2003 WI App 205, ¶11, 267 Wis. 2d 531, 671 N.W.2d 660 (citations omitted). We review the factual findings underlying a circuit court's decision on a suppression motion under the clearly erroneous standard, but review de novo whether the facts establish probable cause to support the arrest. *Id.*, ¶13.

¶8 Foster contends that the police lacked probable cause to arrest him. He contends that the planned controlled buy did not provide probable cause because the police had no information that any drug transaction had taken place at the time of Foster's arrest. Thus, Foster asserts, the only information available to the police at the time of the arrest were the statements by the informants. Foster contends that the statements by the informants did not provide probable cause

because there was no indication of the informants' reliability or that the police corroborated any of the information the informants provided. Foster cites *State v. McAttee*, 2001 WI App 262, ¶9, 248 Wis. 2d 865, 637 N.W.2d 774, for the proposition that "information from a confidential informant may supply probable cause to arrest if police know the informant and from their own direct knowledge know the informant to be reliable." (Quoted source omitted.) Foster points out that, in this case, there was no evidence that the police had worked with the informants before or knew them to be reliable, or that the police corroborated any of the information provided by the informants.

¶9 The State responds that the testimony at the suppression hearing established that the police had probable cause to arrest Foster for a drug offense and felon in possession of a firearm. It cites the following information: (1) the informants told the police that Foster usually carried a handgun in his backpack and carried drugs at all times, that Foster had offered drugs to the informants, and that the informants "could purchase from him if need be"; (2) the informant dropped Foster off at the specified location, consistent with the plan for the informant to do so after the planned controlled buy was completed;¹ and (3) the information provided by the informants was corroborated by the two informants providing the same information and because Foster was picked up and dropped off by the informant at the specified locations, consistent with the planned controlled

¹ The State does not dispute Foster's argument on appeal that there is no evidence in the record to support a finding that the police obtained confirmation of the controlled buy prior to the arrest, and therefore we take the point to be conceded. See *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

buy, and Foster was carrying a black backpack.² The State argues that, together with police knowledge that Foster was a convicted felon, the information provided by the informants, and the planned controlled buy supported probable cause for the arrest.

¶10 We conclude that the police lacked probable cause for the arrest. First, as to the planned controlled buy, the police knew only that the informant picked Foster up and dropped him off between two specified locations and that the plan had called for the drug transaction to occur during the drive. At the time of the arrest, the police had not confirmed that any drug-related activity or discussion had occurred during the drive. Contrary to the State's contention, the fact that the informant picked Foster up and dropped him off as planned only created the possibility that the planned drug transaction had occurred, but did not confirm it. Accordingly, the planned controlled buy adds only marginal value to our analysis.

² The State also argues that the participating informant provided Foster's address and phone number, citing an investigating officer's police report. While the State contends that a reviewing court may consider information outside of the suppression hearing to support the circuit court's decision, it has not cited any case law for the proposition that we may consider statements in a police report that was not admitted as evidence at any hearing. See *State v. Begicevic*, 2004 WI App 57, ¶3 n.2, 270 Wis. 2d 675, 678 N.W.2d 293 (in reviewing court's order on motion to suppress, reviewing court may consider "the complete transcripts of the motion hearing and the jury trial"); *State v. Gaines*, 197 Wis. 2d 102, 106-07 n.1, 539 N.W.2d 723 (Ct. App. 1995) ("When reviewing a suppression order, an appellate court is not limited to examination of the suppression hearing record. It may also examine the trial evidence, ... evidence at the preliminary hearing[, and] the record supporting issuance of a warrant." (citations omitted)). Additionally, the State does not contend that the police confirmed any of the information provided by the informant prior to Foster's arrest. See *State v. Robinson*, 2010 WI 80, ¶¶27-29, 327 Wis. 2d 302, 786 N.W.2d 463 (tip by unnamed informant who walked into a police station and provided information that Robinson was selling marijuana from his apartment supported probable cause when the police were able to verify Robinson's name, address, and phone number as provided by informant, and "officers were cognizant of the fact that Robinson was previously charged with illegal drug activity").

¶11 We are left, then, with police knowledge that Foster was a convicted felon plus the statements by the informants. We need not resolve, for purposes of this opinion, whether the informants were acting as citizen informants or confidential police informants. *See State v. Paszek*, 50 Wis. 2d 619, 630-32, 184 N.W.2d 836 (1971) (distinguishing between “named ‘citizen-informers’ as opposed to the traditional idea of unnamed police contacts or informers who usually themselves are criminals,” and explaining that a less stringent standard of reliability is applied to information provided by citizen informants). Even assuming for purposes of this opinion that the informants were acting as citizen informants rather than confidential police informants and thus applying a less stringent standard of reliability,³ we conclude that the information available to the police did not amount to probable cause.

¶12 We “apply a relaxed test of reliability, that shifts from a question of personal reliability to ‘observational’ reliability,” when assessing information provided by citizen informants. *State v. Williams*, 2001 WI 21, ¶36, 241 Wis. 2d

³ The parties did not argue in the circuit court as to whether the informants were properly characterized as confidential police informants or citizen informants. Rather, without discussion, the parties, police, and circuit court referred to the informants as “confidential informants.” The parties likewise do not develop any argument on appeal as to whether the informants are properly categorized as confidential police informants or citizen informants. Foster argues that the information provided by the informants was not sufficiently reliable under the standard for evaluating information from confidential police informants. The State asserts that that standard does not apply because there was no evidence that the informants received anything from the police in exchange for their cooperation, but does not cite any supporting case law or explain what standard it believes does apply to evaluate the information provided by the informants. Instead, the State contends only that the credibility of the informant who agreed to purchase cocaine from Foster was enhanced by her familiarity with Foster and her willingness to participate in the controlled buy and to allow the police into her home so that they could arrest Foster. As explained below, we will assume in favor of the State that the informants are citizen informants and thus we apply the most relaxed standard for assessing the information they provided, presuming the informants were personally reliable and shifting our focus to their observational reliability.

631, 623 N.W.2d 106 (quoted source omitted). We evaluate the reliability of information provided by a citizen informant based on “the nature of [the citizen’s] report, his [or her] opportunity to hear and see the matters reported, and the extent to which it can be verified by independent police investigation.” *Paszek*, 50 Wis. 2d at 631. The reliability of information provided by a citizen informant may be established by “verification of some of the details of the information reported” or by a showing that the informant actually witnessed the events reported. *Allison v. State*, 62 Wis. 2d 14, 22-24, 214 N.W.2d 437 (1974).

¶13 Here, the nature of the information provided by the informants was that Foster was armed with a handgun that he usually concealed in a black backpack that he carried; that Foster carried drugs on his person at all times and had sold drugs; and that Foster had offered drugs to the informants and the informants would be able to purchase drugs from Foster. There was no testimony at the suppression hearing as to how the informants obtained any of that information or, importantly, when they allegedly obtained any information.⁴ The police were able to verify that the informant picked Foster up and dropped him off at locations specified for a planned controlled buy, and that Foster was carrying a black backpack. While the informants apparently provided the same information, it also appears from the police testimony that the informants were friends and provided the information together at the police station, potentially minimizing the value of that corroboration, absent details about how each informant purported to know anything about Foster. Ultimately, the vague and unverified information

⁴ The police report, which the circuit court accepted into the court file but not as evidence, indicates that one of the informants had seen the handgun in the backpack. The officers did not testify that either of the informants reported seeing the handgun, and the State does not argue that there was any evidence of personal observation.

from the informants as to Foster's involvement in criminal activity was insufficiently reliable to add much to the probable cause analysis. *See State v. Kolk*, 2006 WI App 261, ¶¶12-19, 298 Wis. 2d 99, 726 N.W.2d 337 (information provided by citizen informant insufficiently reliable where informant "neither demonstrated a basis of knowledge nor allowed for much significant corroboration"). The information from the informants, together with police knowledge that Foster was a convicted felon and the planned but unconfirmed drug buy, did not provide more than the mere possibility that Foster had committed or was committing a crime. *See State v. Riddle*, 192 Wis. 2d 470, 476, 531 N.W.2d 408 (Ct. App. 1995). The police therefore lacked probable cause for the arrest. *See id.*

¶14 Alternatively, the State contends that any error in denying the suppression motion was harmless. "In a guilty plea situation following the denial of a motion to suppress, the test for harmless error on appeal is whether there is a reasonable possibility that the erroneous admission of the disputed evidence contributed to the conviction." *State v. Semrau*, 2000 WI App 54, ¶22, 233 Wis. 2d 508, 608 N.W.2d 376. The State points out that Foster pled guilty to only one count, delivery of a controlled substance, and that the evidence supporting that charge derived from the planned controlled buy rather than the fruits of the search following Foster's arrest. The State contends that the only evidence derived from the arrest relevant to the count to which Foster pled was Foster's admission to the police that he had sold cocaine to a female subject that day and other statements admitting drug dealing activity. The State argues that the outcome of the suppression motion would not have been significant to the outcome of a trial as to the delivery charge. The State also contends that the error was harmless because Foster obtained a very favorable plea agreement, resulting in dismissal of three

counts carrying substantial penalties in exchange for his plea to the one count. *See id.* (in determining whether error in denying suppression motion was harmless, one factor to consider is “the benefits obtained by the defendant in exchange for the plea”). The State also argues that it had a strong case against Foster in any event, that Foster never indicated that he entered his plea based on the outcome of his suppression motion, and that the court conducted a thorough plea colloquy before accepting Foster’s plea. *See id.* (listing other factors relevant to harmless error analysis). We are not persuaded.⁵

¶15 The State concedes that at least some of the evidence obtained as a result of the arrest supported the charge to which Foster entered a plea. The State has not shown that its case against Foster as to that charge was so strong that the additional evidence could not have played a role in Foster’s decision to enter a plea. The fact that Foster obtained a favorable plea deal and the thoroughness of the plea colloquy do not overshadow the other factors we consider in our harmless error analysis. We conclude that the State has not met its burden to show that the error was harmless. *See State v. Rockette*, 2005 WI App 205, ¶26, 287 Wis. 2d 257, 704 N.W.2d 382. We reverse and remand with directions for the circuit court to vacate the judgment of conviction, allow Foster to withdraw his plea, and grant the suppression motion.

⁵ Foster argues in reply that we called into question the “reasonable possibility” standard for harmless error set forth in *State v. Semrau*, 2000 WI App 54, 233 Wis. 2d 508, 608 N.W.2d 376, in *State v. Rockette*, 2005 WI App 205, 287 Wis. 2d 257, 704 N.W.2d 382. We need not resolve whether *Semrau*’s test is still good law, however, because the State has not established that the error in this case was harmless under the “reasonable possibility” standard in *Semrau*.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

